Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-79

LT. COL. CHESTER ROBERT MEAD and DOROTHY E. MEAD, husband and wife,

Petitioners,

vs.

ROBERT E. NACEY and BARBARA M. NACEY, husband and wife; NICHOLAS JOHNOFF and FLORENCE M. JOHNOFF, husband and wife; CYNTHIA J. VAN AUKEN,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

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In The

SUPREME COURT OF THE UNITED STATES

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No._____

LT. COL. CHESTER ROBERT MEAD and DOROTHY E. MEAD, husband and wife,	)
Petitioners,	)
vs.	)
ROBERT E. NACEY and BARBARA M. NACEY, husband and wife; NICHOLAS JOHNOFF and FLORENCE M. JOHNOFF, husband and wife; CYNTHIA J. VAN AUKEN,	)
Respondents.	)

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals, Division Two, State of Arizona, in the above case, entered on February 4, 1975, and entered as amended on

OPINIONS BELOW

The judgment of the Superior Court in and for the County of Pima, State of Arizona, entered October 2, 1973, is unreported (Appendix C-9). The order of the Superior Court denying appellants' motion for new trial entered November 19, 1973, is also unreported (Appendix C-7). The amended opinion of the Court of Appeals of the State of Arizona, Division Two, was entered February 11, 1975, and is reported in 531 P.2d 166, 23 Ariz.App. 121 (Appendix B-7). The order of the Court of Appeals denying petitioners' motion for rehearing entered March 12, 1975, is unreported (Appendix B-10). The order of the Supreme Court, State of Arizona, denying the petition to review entered without opinion on April 15, 1975, is noted in 531 P.2d 166

(Appendix A-2). The Court of Appeals affirmed the judgment of the Superior Court May 5, 1975 (Appendix B-11). 3

JURISDICTION

The amended opinion of the Court of Appeals, Division Two, State of Arizona, was entered on February 11, 1975, and is referred to in the Appendix to this petition at p. B-7. The order of the Supreme Court, State of Arizona, denying review was entered April 15, 1975, and said order is set forth in the Appendix hereto at p. A-1.

The Court of Appeals affirmed the judgment of the Superior Court May 5, 1975 (Appendix B-11).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the sections of pre-1973 Arizona Statutes (A.R.S. Sec. 25-211(B) and A.R.S. Sec. 25-214(A)) which give the husband sole power to manage and dispose of community personalty and exclusive power to enter into contracts binding the community established a constitutionally impermissible distinction between males and females solely on the basis of sex in violation of the due process and equal protection clauses of the United States Constitution.

2. Whether the trial court erred in entering judgment against the petitioner wife, Dorothy Mead, and the marital community under the discrimination provisions of Arizona statute A.R.S. 25-211(B) and Arizona statute A.R.S. 25-214(A), where petitioner wife refused and failed to sign the deposit receipt and sales agreement.

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3. Whether the trial court erred in entering judgment against petitioner husband, Chester R. Mead, individually, and against the marital community under the discriminatory provisions of Arizona statutes A.R.S. 25-211(B) and A.R.S. 25-214(A) where the deposit receipt and agreement was signed in the community interest but in the absence of the wife and subject to her approval, which was never obtained.

4. Whether the challenged provisions of Arizona statutes serve any rational or compelling state purpose.

5. Whether the post-trial amendments to Arizona statute A.R.S. 25-214(B) (Added Laws 1973, Ch. 172, Sec. 64) which gave the spouses equal management, control and disposition over community property raises a mootness issue.

6. Whether the post-trial amendments to Arizona statute A.R.S. 25-214(B)

established a constitutionally impermissible distinction between married persons and unmarried persons by subjecting married persons to joint and several contractual liabilities incurred by any one spouse without regard to the status of the marital community or the emotional stability of the marriage or the financial posture of the marital community whereas unmarried persons are not subject to similar liabilities.

7. Whether it was error and a gross abuse of discretion under all circumstances for the state court to refuse to find confession of reversible error where the third-party defendants and appellees failed to file a responsive brief within the time required by Rule 7(a)(7) of the Rules of the Supreme Court of Arizona; where, notwithstanding appellees failure to timely respond, as required by the Rules, the State Court of Appeals, on its own motion,

entered an order seventeen days after the responsive brief was due permitting cross-appellees to join in appellees answering brief and requiring no further appearance or response where there is no state precedent to support the Court's actions, and where the action of the court totally precluded petitioners from obtaining a review of the adverse order of the Superior Court entered in petitioners' third-party complaint below.

STATEMENT OF THE CASE

These proceedings were commenced on January 6, 1971, when respondents Robert and Barbara Nacey, residents of the State of Wyoming, filed a complaint in the Superior Court of Pima County seeking specific performance of an alleged agreement by Chester R. Mead and Dorothy Mead, husband

and wife, to buy a residence and lot owned by respondents in Tucson, Arizona.

The deposit receipt and sales agreement upon which respondents based their complaint was a standard printed form containing numerous handwritten notations prepared by respondents Florence Johnoff, a licensed real estate broker doing business in Tucson, Arizona, and Cynthia Van Auken, a sales person for Johnoff Realty, and signed by petitioner Chester R. Mead only on September 23, 1970.

At the time Chester R. Mead signed the above document, the petitioner Dorothy E. Mead was residing in Alexandria, Virginia, with the couple's children and Mrs. Mead's mother. The transaction was specifically conditioned upon petitioner Dorothy Mead's inspection and approval of the property.

The receipt set January 2, 1971, one hundred and one days after the initial

signing, as the date for closing the transaction in order to provide sufficient time for petitioner Dorothy Mead to come to Arizona and approve or disapprove of the transaction. Petitioner Dorothy Mead was not advised of the transaction until September 25, 1970, two days after Chester Mead signed the receipt. She never approved the transaction and never signed the receipt nor any document relating thereto.

It is undisputed that the Meads and the Naceys never met prior to the trial on May 1, 1970, never communicated, and that the only contact each had with the other was through third-party defendants appellees, the broker Johnoff and the saleswoman Van Auken.

In March, 1971, subsequent to selling the house to another party, Nacey filed an amended complaint seeking general and punitive damages.

On April 13, 1973, prior to the trial of this case in the Superior Court, petitioners filed a motion to amend to plead affirmatively constitutional defenses arising under the due process and equal protection clauses of the Fourteenth Amendment and the motion was denied on April 26, 1973 (Appendix C-4).

The matter was tried to the court sitting without a jury on May 1 and 2, 1973. The trial court entered judgment October 2, 1973, in favor of sellers against Chester R. Mead in the sum of $11,160.00 plus costs and in favor of Johnoff and Van Auken, the broker and saleswoman, and severally and the community, against Chester R. Mead and Dorothy E. Mead and the community, husband and wife, jointly, plus costs.

Petitioners' motion for new trial was timely filed pursuant to Rule 59(a) of the Rules of Civil Procedure, on October 24, 1973, including as grounds therefor

that the judgment violated the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution (Appendix C-6). 11

During a hearing on November 19, 1973, the trial court denied petitioners' motion for new trial and oral motion for summary reversal of the judgment. On dual motions by the Naceys and Johnoff and Van Auken, the trial court amended the earlier judgment to provide that the sum of $12,160.00 be paid to respondents and further to provide that the sum of $2,000.00 delivered by petitioners to Johnoff be paid $1,000.00 to Johnoff and $1,000.00 to the Naceys. Subsequent to the trial and while the action was on appeal, the respondents persuaded the escrow company to deliver to them the $2,000.00 belonging to petitioners, which amount was divided between the Naceys and Johnoff.

The judgment was entered on November

19, 1973.

Petitioners' notice of appeal and designation of record on appeal was timely filed and cash bond on appeal in the amount of $250.00 was deposited with the Superior Court on January 18, 1974.

Petitioners filed the opening brief on appeal in this action on August 7, 1974, and all answering briefs were due within thirty days after that date (A.R.S. 17A, Rule 5(f); Rule 47). On September 13, 1974, pursuant to the order of the Court of Appeals entered September 9, 1974, granting respondents additional time in which to respond, the Naceys filed their answering brief.

On September 24, 1974, seventeen days after the last brief was due and eleven days after the last brief was filed in this case, an order was entered by the Court of Appeals granting leave to Johnoff and Van Auken to join in Naceys' answering brief.

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The order was not predicated upon a motion by respondents.

On January 8, 1975, oral arguments were heard in the Court of Appeals and the order and opinion of that Court totally denying relief to petitioners was expeditiously entered on February 4, 1975.

On February 11, 1975, the Court of Appeals amended its order to eliminate the statement holding that Dorothy Mead would be liable even under the post-trial provisions of A.R.S. 25-214(B).

REASONS FOR GRANTING WRIT

1. The opinion and order of the Court of Appeals establishes by judicial mandate as the law of the State of Arizona, a constitutionally impermissible distinction between married males and married females in matters affecting the marital community in violation of the equal protection and due process clauses of the Fourteenth Amendment.

2. The opinion and order of the Court of Appeals establishes by statute and judicial mandate as the law of Arizona a constitutionally impermissible distinction between married men and women as a class in violation of the due process and equal protection clauses of the Fourteenth Amendment.

3. The opinion and order of the

Court of Appeals fails to distinguish between state statutes applicable solely to community personal property and state statutes applicable to community realty and sets a precedent which, unless reversed, effectively eliminates the right of married women to participate as equal partners in the marital community in derogation of constitutional guarantees.

4. The opinion and order of the Court of Appeals leaves intact in the State of Arizona the constitutionally imperfect statutory principle that the husband is the sole manager of the community.

5. The Court of Appeals' refusal to find confession of reversible error on the part of respondents Johnoff and Van Auken is erroneous and not supported by state law and effectively denies petitioners the right to a review of the adverse order of the Superior Court entered on petitioners' third-party complaint in

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX D (Constitutional Provisions, Statutes and Rules Involved):

Constitutional Provisions — D-1

Statutes — D-1

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[In the Supreme Court of the State of Arizona: Chester R. Mead, et ux, versus Robert E. Nacey, et ux., et al., No. 12034-PR]

[Caption]

Order (Corrected Copy)

Dated: April 16, 1975

The following action was taken by the Supreme Court of the State of Arizona on April 15, 1975 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division Two, this 16th day of April, 1975.

[Signature of Clifford H. Ward,
Clerk, by Mary Ann Hopkins,
Deputy Clerk]

[Caption under the
Court of Appeals,
State of Arizona,
Division Two]

Petition for Review

Filed: March 26, 1975

Appellants, Chester R. Mead and Dorothy E. Mead, husband and wife, respectfully petition that this cause be reviewed by the Supreme Court of Arizona.

[Signature of Dorothy E.
Mead, Attorney for Appellants]

[In the Court of Appeals, State of Arizona, Division Two; Chester R. Mead, et ux., versus Robert E. Nacey, et ux., et al., No. 2CA-CIV-1641]

[Caption]

Order

Filed: February 4, 1975

* * *

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its Opinion.

IT IS ORDERED that the Opinion be filed by the Clerk, and, under the Rules of the Supreme Court, Rule 47(a), fifteen days are allowed from this date to file a Motion for Rehearing.

IT IS FURTHER ORDERED that a copy of this Order, together with a copy of the Opinion, be sent to each party appearing or the attorney for such party

and to the Honorable Robert O. Roylston, Judge.

Dated: February 4, 1975.

[Signature of Lawrence Howard, Chief Judge]

[Caption]

Opinion

Filed: February 4, 1975

* * *

This is an appeal from a judgment entered against Chester R. Mead, individually, providing that he pay the plaintiffs, Robert E. Nacey and Barbara M. Nacey, the sum of $12,160.00. Appellants also appeal from a denial of their claim against the third-party defendants, cross-appellees, Nicholas Johnoff and Florence M. Johnoff, real estate brokers, and Cynthia J. Van Auken, an agent for Johnoff Realty,

This action arises out of a refusal by appellants to perform a written agreement providing for the purchase of a lot in El Encanto Estates. Chester Mead, on September 23, 1970, signed a deposit receipt and sales agreement prepared by Johnoff Realty and delivered his personal check to the broker in the sum of $1,000.00. The following day, Mead was informed that the owners had accepted the check but demanded an additional $1,000, which was also delivered to the broker in the form of a personal check from Mead. It appears that prior to signing the sales agreement, Mead had sought out Van 'uken and given her the task of finding a residence. Neither Van Auken nor the Johnoffs had any contact with the Kaceys until after Chester Mead signed the sales agreement. It is undisputed that Dorothy Mead never signed the deposit and sales agree-

ment. Additionally, the Meads and Naceys never met prior to trial and never communicated except through Van Auken and the Johnoffs.

Appellants argued below that the agreement was specifically conditioned on Dorothy Mead's mother making a financial contribution to the down payment, plus monthly upkeep, and on Dorothy Mead's inspection and approval. Van Auken denied these conditions, as did Florence Johnoff.

Appellants further claim that at a meeting on November 30, 1970, they refused to go ahead with the purchase. This claim was directly controverted by Johnoff and by a witness who said the Meads expressed great satisfaction with the Naceys' house.

On appeal, appellants assert that A.R.S. Sec. 25-124(A), which formerly provided that only the husband could make contracts binding upon the community

property of the husband and wife is unconstitutional because it violates a married woman's 14th Amendment rights to due process and equal protection. Secondly, appellants assert that they were entitled to judgment as to their third-party action against cross-appellees for breach of their fiduciary duty.

Appellants assert as to their first contention that Mrs. Mead's rights of equal protection and due process were violated by awarding judgment based upon A.R.S. Sec. 25-214(A) in favor of the appellees. Their argument is that prior to the 1973 amendment of A.R.S. Sec. 25-214 the husband was the single marital partner who could make contracts binding upon the community property of the husband and wife. And, that this distinction between husband and wife was based solely on sex and failed to satisfy any legitimate state objective, citing Reed v. Reed, 404

The record discloses that the action was filed against appellants seeking relief jointly and severally and against the community. The judgment for the sum of $12,160, plus costs, was entered against Chester R. Mead, individually. Additionally, the sum of $2,000 paid and delivered by Chester R. Mead and held by Country Escrow Service was ordered to be paid, $1,000 to the Johnoffs and $1,000 to the Naceys.

Assuming she is an aggrieved party, we find no merit in Dorothy Mead's claim that she was denied equal protection of the law by the operation of the pre-amended version of A.R.S. Sec. 25-214(A). The facts of this case do not involve a situation wherein the wife was denied the right to bind the community by entering into a deposit receipt and sales agree-

ment. Rather, this is simply a case B-7 wherein the community could have been held liable for the acts of the husband in pursuit of a community interest. This should not be construed as a denial of the wife's right to equal protection of the law. [Had the circumstances of this transaction occurred **after** A.R.S. Sec. 25-214, as amended, was in effect, the wife would still be equally liable as a member of the community because her approval would still not be necessary since either spouse may now acquire community property and bind the community.][1]

Had the situation here been one in which the wife was denied the right to

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[1] Bracketed material deleted by Order of the Court dated February 11, 1975.

obligate the community as the husband may, we would give serious consideration to the merits of an equal protection argument. However, such is not the case.1/

As to appellants' third-party claim against the Johnoffs and Van Auken for breach of contractual or fiduciary duties, we find no grounds for reversal. Appellants merely assert the same facts and arguments on appeal which were presented to the trial court. Pursuant to Rule 52(a), Rules of Civil Procedure, 16 A.R.S., where findings of fact are made by the trial court, those findings are binding unless they are clearly erroneous and due regard should be given to the opportunity of the trial court to weigh the credibility

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1/ Although appellants did not raise the issue regarding the possible constitutional infirmities of A.R.S. Sec. 25-214(A) at trial, we regard the issue of sufficient general importance to justify consideration on appeal. Porter v. Eyre, 80 Ariz. 169, 294 P.2d 661 (1956).

of the witnesses. Aztec Film Productions v. Tucson Gas & Electric Co., 11 Ariz.App. 241, 463 P.2d 547 (1970); Thornton v. Southwest Flour and Feed Co., 8 Ariz.App. 190, 444 P.2d 747 (1968).

Additionally, appellants argue that because the third-party defendants, appellees, did not submit a responsive brief but merely joined in the plaintiffs-appellees' answer, which did not address itself to the third-party claim, this court should find that there has been a confession of error. Rule 7(a)(2), Rules of the Supreme Court, 17 A.R.S., does not mandate reversal. Blech v. Blech, 6 Ariz.App. 131, 430 P.2d 710 (1967). More importantly, the mere failure to file is not sufficient but must be coupled with the presentation of debatable issues. Here, no debatable issues are raised as to the third-party claim. Facts previously alleged and

argued below are merely re-asserted.

Affirmed.

[Signature of Herbert F. Krucker, Judge; Lawrence Howard, Chief Judge, and James D. Hathaway, Judge, concurring]

[Caption]

Order

Filed: March 12, 1975

IT IS ORDERED that the Motion for Rehearing and the Supplemental Motion for Rehearing Relative to Amended Order be, and the same are hereby, denied.

Dated: March 12, 1975.

[Signature of Lawrence Howard, Chief Judge, Herbert F. Krucker, Judge, and James D. Hathaway, Judge]

Mandate

Filed: May 5, 1975

GREETING:

WHEREAS, lately in the Superior Court of the State of Arizona in and for the County of Pima, before you in a cause between

[Caption]

as by the inspection of the record of the said Superior Court, which was brought into the Court of Appeals, Division Two, of the State of Arizona by virtue of an appeal by the Defendants, as Third Party Plaintiffs, Chester R. Mead and Dorothy E. Mead agreeably to the law in such case made and provided fully and at large appears.

AND WHEREAS, in January, in the year of our Lord one thousand nine hundred and

seventy-five, the said cause came on to be heard before the said Court of Appeals, Division Two, and was submitted for decision after oral argument.

ON CONSIDERATION WHEREOF, it was on the fourth day of February, in the year of our Lord one thousand nine hundred and seventy-five, ordered by this Court that the Judgment of the said Superior Court in this cause on appeal be, and the same is hereby, affirmed--all in accordance with the Opinion of this Court.

You therefore are hereby commanded that such proceedings be had in said cause, as according to the decision and order of this Court, and as according to right and justice, and to law, ought to be had.

WITNESS, the Honorable Lawrence Howard, Chief Judge of the Court of Appeals, Division Two, of the State of

Arizona, the fifth day of May,
in the year of our Lord one thousand nine hundred and seventy-five.

February 18, 1975	Motion for Rehearing.
February 26, 1975	Supplemental Motion for Rehearing Relative to Amended Order.
March 7, 1975	Appellees Nacey's Objections to Motion for Rehearing.
March 12, 1975	ORDER Denying Motion for Rehearing and Supplemental Motion for Rehearing Relative to an Amended Order.
March 19, 1975	Petition for Review
April 15, 1975	Petition for Review denied by order of the Arizona Supreme Court.

[Caption]

Motion for Rehearing

Filed: February 18, 1975

APPELLANTS RESPECTFULLY move this

Honorable Court for a rehearing relative to its Opinion and Order of February 4, 1975, upon the following grounds:

1. The Opinion and Order of this Court establishes by Judicial Mandate as the law of this State a constitutionally impermissible distinction between married males and married females in matters affecting the marital community in violation of the equal protection and due process clauses of the Fourteenth Amendment.

2. The Opinion and Order of this Court establishes by statute and judicial mandate as the law of this State a constitutionally impermissible distinction between married men and women as a class and single men and women as a class in violation of the due process and equal protection clauses of the Fourteenth Amendment and in violation of the First Amendment to the Constitution of the United

3. The Opinion and Order of this Court fails to distinguish between state statutes applicable solely to community personal property and state statutes applicable to community realty and sets a precedent which, unless reversed, effectively eliminates the right of married women to participate as equal partners in the marital community in derogation of constitutional guarantees.

4. The Opinion and Order of this Court leaves intact the constitutionally imperfect statutory principle that the husband is the manager of the community.

5. The Court's finding that there are no debatable issues presented in Appellants Third Party Claim is erroneous, is not supported by the record, and unless reversed, effectively denies Appellants relief to which they are entitled by reason of fraudulent acts of

Third Party defendants, appellees Johnoff and Van Auken.

6. The Court's refusal to find confession of reversible error on the part of Third Party defendants, appellees, Johnoff and Van Auken, is erroneous and not supported by State law.

FACTS

These proceedings were commenced on January 6, 1971, when appellees Robert and Barbara Nacey, residents of the State of Wyoming, filed a complaint seeking specific performance of an alleged agreement by Chester R. Mead and Dorothy Mead, husband and wife, to buy a residence and lot owned by Appellees in Tucson, Arizona.

The deposit receipt and sales agreement upon which appellees based their complaint was a standard printed form prepared by third party defendants appellees

Florence Johnoff, a licensed real estate broker doing business in Tucson, Arizona, and Cynthia van Auken, a saleswoman for Johnoff REalty [sic], and third party defendant appellee, and signed by appellant Chester R. Mead only on September 23, 1970.

At the time Chester R. Mead signed the receipt, appellant Dorothy E. Mead was residing in Alexandria, Virginia, with the couple's children and the mother of Dorothy Mead. The receipt was specifically conditioned upon appellant Dorothy Mead's inspection and approval and upon obtaining financial assistance from appellant Dorothy Mead's mother. These conditions were oral.

The receipt set January 2, 1971, one hundred and one days after the initial signing, as the date for closing the transaction in order to provide sufficient time for appellant Dorothy Mead to

come to Arizona and approve or disapprove the transaction. Appellant Dorothy Mead was not advised of the transaction until September 25, 1970, two days after Chester Mead signed the receipt. She never approved the transaction and never signed the receipt nor any document relating thereto.

It is undisputed that the Meads and the Naceys never met prior to the trial on May 1, 1970, never communicated, and that the only contact each had with the other was through third party defendants appellees, the broker Johnoff and the saleswoman van Auken. Van Auken is also a retired Army Officer who was formerly stationed at Fort Huachuca, Arizona, at the same time Appellant Chester Mead was serving an earlier tour. Both appellants became acquainted with third party defendant appellee at that time.

In March, 1971, subsequent to

selling the house to another party, appellees Nacey filed an amended complaint seeking general and punitive damages.

On April 13, 1973, prior to the trial of this case in the Superior Court appellants filed a motion to amend to plead affirmatively constitutional defenses arising under the due process and equal protection clause of the Fourteenth Amendment and the motion was denied.

The matter was tried to the Court sitting without a jury on May 1 and 2, 1973. The Trial Court's initial ruling dated October 2, 1973, order [sic] that judgment be entered in favor of appellees against appellant husband only in the sum of $11,160.00 (Eleven Thousand One Hundred Sixty and no/100 Dollars) plus costs and that judgment be entered in favor of third party defendants-appellees against appellants husband and wife, jointly, plus

osts.

Appellants' Motion for New Trial was timely filed pursuant to Rule 59(a) of the Rules of Civil Procedure, on October 24, 1973, including as grounds therefor that the judgment violated the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States.

During a hearing on November 19, 1973, the Trial Court denied appellants' Motion for New Trial and oral Motion for Summary Reversal of the Judgment. On dual motions by appellees and third party defendant appellee the Court amended the earlier judgment to provide that the sum of $12,160.00 (Twelve Thousand One Hundred Sixty and no/100 Dollars) be paid to appellees, and further to provide that the sum of $2,000.00 (Two Thousand and no/100 Dollars) delivered by appellants to third party defendants be paid $1,000.00

(One Thousand and no/100 Dollars) to appellees and $1,000.00 (One Thousand and no/100 Dollars) to the broker, third party defendant appellee.

The formal judgment was signed in open court the same date.

Appellants' notice of appeal and designation of record on appeal was timely filed and cash bond on appeal in the amount of $250.00 (Two Hundred Fifty and no/100 Dollars) was deposited with the Court on January 18, 1974.

Appellants filed the Opening Brief on appeal in this action on August 7, 1974, and all answering briefs were due within thirty days after that date (A.R.S. 17A - Rule 5(F): Rule 47). On September 13, 1974, pursuant to the Order of this Court entered September 9, 1974, granting Appellees additional time in which to respond, Appellees Nacey filed their Answering Brief.

On September 24, 1974, 17 days after the last brief was due and eleven days after the last brief was filed in this case, an Order was entered by this Court granting leave to third party defendants-appellees Johnoff and van Auken to join in Appellees' Nacey's Answering Brief. The Order was not preceded by a Motion.

On January 8, 1975, oral arguments were heard in the Court of Appeals and the Order and Opinion of that Court totally denying relief to Appellants was expeditiously entered on February 4, 1975.

DISCUSSION

1. In 1963 [sic], in London, a thesis was set out in The Lawes Resolutions of Womens Rights holding that:

> Man and wife are one person, but understand in what manner. When a small brooke or little river incorporateth with Rhodanus,

> Humber or the Thames, the poor rivulet looseth its name, it is carried and recarried with the new associate, it beareth no sway, it possesseth nothing during coverture. A woman as soon as she is married, is called covert, in Latin, nupta, that is, veiled, as it were, clouded and overshadowed, she hath lost her streame.... To a married woman, her new self is her superior, her companion, her master. Quoted in E. Flexner, Century of Struggle 7-8 (1970 ed).

The world progressed and 135 years later Blackstone explained the position of women:

> By marriage, the husband and wife are one person in law; that is, the very being or

> legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything; and is therefore called in our law-french a feme-covert....under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. 1 Blackstone's Commentaries on the Law of England 442 (3d Ed. 1768)

In Arizona, in 1973, an Assistant Attorney General representing the State argued in support of the constitutionality of Arizona Revised Statutes,

Sections 25-211(B) and 25-214(A) which B-25
gave to the husband sole power to manage and dispose of community personal property and the exclusive power to enter into contracts binding the community, citing from a 1914 case dating back to the First World War:

> The law, in giving this power to the husband during coverture to dispose of personal property, does not do this in recognition of any higher or superior right that he has therein, but because the law considers it expedient and necessary in business transactions affecting the personality [sic] to have an agent of the community with power to act. So it has clothed the husband with this agency, deeming him the best qualified for the purpose ...

LaTourette v. LaTourette, 15

The state representative contended that:

> The public policy ... justifies a legitimate and compelling state interest in choosing one of the marital partners to manage the community personalty. In no way is the policy discriminating because, since public policy demands that one of the partners have such powers, common experience shows that in the majority of cases, the husband is the one who is the man producer [sic] of income for the community, and therefore, has more contacts with the business community than the wife.

and argued that this policy was not discriminatory.

> ...The Fourteeneth [sic] Amendment does not interfere by creating a fictitious equality where there is a real difference.

Nearly half a millennium later in 1975 this Court has progressed only a milliban [sic] beyond the London of 1632.

In finding no merit to appellants' claim that Dorothy Mead had been denied due process and equal protection as guaranteed by the Fourteeneth [sic] Amendment, under the pre-1973 version of ARS Section 25-214(A) the court stated:

> The facts of this case do not involve a situation wherein the wife was denied the right to bind the community by entering into a deposit receipt and sales agreement. Rather, this is simply a case wherein the community could

> have been held liable for the acts of the husband in pursuit of a community interest. This should not be construed as a denial of the wife's right to equal protection of the law.

Indeed, said the Court, had the circumstances occurred after the statute was amended "her approval would still not be necessary", overlooking that the amended version expressly requires the joinder of both spouses in any action involving the acquisition or disposition of realty.

Two thousand years ago Aristotle noted that the right to say yes or to approve carries with it the concomitant right to say no or disapprove. The statute as interpreted by the court permits, at best, a "yea" vote to a married woman in matters affecting the marital community but reserves to the husband the right to say no or disapprove. The right to "rubber-

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stamp" the husband's acts is an empty right and denies to married women full participation in the operation of the community. In this it denies married women Fourteeneth [sic] Amendment guaranties of due process and equal protection.

2. On November 19, 1973, appellants pursuant to Rule 59(a) of the Rules of Civil Procedure moved for a new trial in the Superior Court on the grounds that the Judgment of the Superior Court was not justified by the evidence and was contrary to law. (emphasis added). The record in this case clearly shows and there is no dispute that the only contact between appellees and appellants was through third party appellees Johnoff and van Auken. The third party appellees are not mere appendages to this suit but absolutely essential parties. Appellees Nacey have cited in support of their claim third party appellees' testimony which appellants at

the hearing on motion for a new trial contend was perjured. Neither the Superior Court nor this Court has addressed that issue.

Further, the position taken by third party appellee Johnoff at the trial of this action and as reflected in the record is that appellant Chester Mead intended to buy the residence and lot as his "sole and separate" property. The appellees have contended throughout that appellant wife is bound whether or not she signed. These positions are totally irreconcilable and, therefore, debatable issues remain to be answered. Appellants contention that the judgment was not <u>justified by the evidence</u> opens the door to this Court to review the evidence.

Where findings of fact made by the trial court are clearly erroneous those findings are not binding.

3. The failure of the third party B-31
defendants, appellees to file a responsive brief within the time required by Rule 7(a)(2), Rules of the Supreme Court 17 A.R.S. mandates reversal of the Order of the Superior Court entered October 2, 1973 in favor of cross-appellees and against appellants.

Notwithstanding, cross-appellees failure to timely file as required by the Rules of the Supreme Court with this Court, without benefit of motion, entered an order seventeen days after the response brief was due permitting cross-appelles to join in Appellees Nacey's answer. The action of the Court is without precedent in this state. It is particularly prejudicial to appellants in that appellees Nacey specifically rejected cross-appellees in their Answering Brief and stated in open court during oral arguments that appellees did not represent cross-appellees. The action

of the Court precluded Appellants obtaining an impartial review of the Order of the Superior Court entered in appellants third party claim against cross-appellees.

In holding that Rule 7(a)(2) does not mandate reversal, the Court cites Blech v. Blech, 6 Ariz. App. 131, 430 P.2d 710 (1967).

The laws of the State of Arizona, the rules of this Court, and judicial decisions make it clear that failure to file an answering brief where debatable issues are raised on appeal constitutes confession of error on the part of appellees.

In re O'Neill, 10 Ariz. App. 423, 459 P.2d 340 (1969);

Town of Cottonwood v. Evans, 13 Ariz. App. 595, 480 P.2d 16 (1971);

Campbell v. Molik, 9 Ariz. App. 562, 454 P.2d 1002 (1969);

Beck v. Beck, 9 Ariz. App. 77, 449

City of Tucson v. Echo Ridge, 6 Ariz. App. 465, 433 P.2d 645 (1967) and other decisions too numerous to list support this judicial principle.

"One exception to the reversible error rule occurs when the appellee is not the real party in interest but only represents the real party; for example, a parent representing his infant childre [sic]. Hoffman v. Hoffman, 4 Ariz. App. 83, 47 P.2d 717 (1966); See also Blech v. Blech, 6 Ariz. App. 131, 430 P.2d 710 (1967); Carter v. State ex rel Eyman, 5 Ariz. App. 415, 427 P.2d 549 (1969)." This opinion appears in an order entered by this Court three years after the Blech ruling in an opinion in State ex rel Flickinger v. Harris, 11 Ariz. App. 362, 464 P.2d 808 (1970).

WHEREFORE, appellants pray that this honorable Court rehear this matter and re-

consider its Order of February 4, 1975. B-34

[Signature of Dorothy E. Mead, Attorney for Appellants]

[Caption]

Supplemental Motion for Rehearing Relative to Amended Order

Filed: February 26, 1975

On February 4, 1975, this Honorable Court filed its opinion and Order in the above case. On February 13, 1975, Appellants filed their Motion for Rehearing relative to the above Order. On February 13, 1975, Appellants were served with a copy of the Order of this Honorable Court dated February 11, 1975, amending its Order of February 4, 1975.

Appellants therefore, move this Honorable Court for a rehearing relative to

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its Opinion and Order of February 4, 1975, and its amended Order of February 11, 1975, restating the grounds set forth in their initial Motion for Rehearing filed February 13, 1975 and upon the additional grounds raised by the amended Order as stated in this supplement to the Motion for Rehearing.

The Order entered February 11, 1975, deletes from the earlier Opinion and Order of this Court the sentence stating:

> "Had the circumstances of this transaction occurred after A.R.S. Sec. 25-214, as amended, was in effect, the wife would still be equally liable as a member of the community because her approval would still not be necessary since either spouse may now acquire community property and bind the community."

In deleting the quoted sentence, the Court clearly demonstrates its recognition that the earlier Order was in total conflict with those provisions of present state law which provide:

> "Either spouse spearately may acquire, manage, control, or dispose of community property or bind the community, <u>except that joinder of both spouses is required in any of the following cases</u>:
>
> 1. <u>Any transaction for the acquisition, disposition or encumbrance of an interest in real property</u> other than an unpatented mining claim or a lease of less than a year.
>
> 2. Any transaction of guaranty, indemnity or suretyship. Added Laws 1973, Ch. 172 Sec. 64.

However, in deleting the relevant language, the Court's Order also raises more questions than it answers.

In its February 4th Order prior to amending on February 11th, the Court found no violation of either the due process or the equal protection clauses of the Fourteenth Amendment on the grounds that Appellant wife, Dorothy Mead had not been denied the right to bind the community. The court's announced basis for finding no constitutional violations coupled with its clear misstatement of existing state law indicates a disturbing misunderstanding of the facts in this case and the law pertaining thereto.

Only, said this Court, would we "give serious consideration to the merits of an equal protection agreement," [h]ad the situation here been one in which the wife was denied the right to obligate the community as the husband may..." (emphasis

added). Unquestionably the Court is reiterating the tenets and premises of state statutes, primarily pre-amended A.R.S. Section 25-211(B) and A.R.S. Section 25-214(A) which gave the husband the sole and exclusive right to enter into community contracts. However, at no time have appellants claimed that either spouse was denied the right to bind the community. Rather, appellants have repeatedly urged this Court and the Superior Court to recognize what the facts in this case so clearly show - that absent the wife's approval and signature, there was no contract.

Appellees do not contend, and it would be ludicrous in the extreme were we asked to believe, that had the situation here been reversed, i.e. had the wife signed and the husband refused to approve or sign the receipt, that a binding contract would have been executed. It is this distinction, this treatment of the facts, this

interpretation of state law which is clearly violative of the due process and equal protection guarantees of the Fourteenth Amendment.

The Court, in its February 4th Order finds the community, as well as the husband individually, liable on one set of operative facts. The court states, page 3, "Rather, this is simply a case wherein the community could have been held liable for the acts of the husband in pursuit of a community interest".

Appellants do not disagree that, had there been an executed contract, it would have been "in pursuit of a community interest". However, appellants disagree completely that the husband is the only party necessary to the community and further, that the wife's position remains so neglible [sic] that in the eyes of the law of this state, the absence of her signature can be completely ignored.

Third party defendants, appellees, the broker Johnoff and the sales agent van Auken at the trial of this action stated, under oath, that appellant husband intended to buy the property "sole and separate" to explain the absence of the wife's signature. The testimony was contradicted by the escrow agent selected by Johnoff to hold the Two Thousand and no/100 Dollars ($2,000.00) paid by appellant husband Mead from community funds, and by other witness testimony including appellee Nacey. The position taken by third party defendant appellees unsupported by any evidence, is of course, completely contradictory to the law of this state.

The burden of proof is upon one claiming the property acquired during coverture to be separate property to establish that fact by clear and satisfactory evidence. Lincoln Fire Insurance Co. of New York v. Barnes, 53 Ariz. 284, 88 P.2d 533

(1934); Evans v. Evans, 79 Ariz. 284, 288 P.2d 775 (1955). The position, never varied, taken by appellants is simply this: had there been a contract, it would have been a community contract, therefore, it required, and appellees were clearly advised that it so required, approval of both spouses. The approval of the wife was never secured and her signature was never obtained. Thus, this Court can rule consistent with constitutional principles, that there was no contract or can pursue a constitutionally impermissible course and continue to hold that both spouses need not approve or sign - so long as the one failing to approve or sign is the wife.

The Court clearly does not have the prerogative to find on the one hand, that this is "simply a case wherein the community could have been held liable for the acts of the husband in pursuit of a com-

munity interest" and thus find individual liability on the part of the husband, as well as joint liability of the Husband and Wife and total community liability all on the husband's signature alone. At some point, the Court must "either fish or cut bait". To attempt to remain on a clearly defined unconstitutional course demonstrates inescapably that the Opinion and Order objected to flows from either a misunderstanding of the facts and the applicable law, a position appellants do not believe exists, or a bias and prejudice against actions alleging unconstitutional discrimination on the basis of sex (female) so strong that it renders an objective and impartial review impossible in the Courts of this State. That this may be the crux of the problem is not impossible.

In 1971, two legal scholars, both of them male, examined the records of the

judiciary in sex discrimination cases. B-43
They concluded that the performance of American judges in this area "can be succinctly described as ranging from poor to abominable". With some notable exceptions said the two scholars:

> "[judges] have failed to bring to sex discrimination cases those virtues of detachment, reflection, and critical analysis which have served them so well with respect to other sensitive social issues. Judges have largely freed themselves from the patterns of thought that can be stigmatized as 'racist'...[But] 'sexism' - the making of an unjustified (or at least unsupported) assumption about individual capabilities, interests, goals and social roles solely on the basis of sex differences - is as easily discernable

in contemporary judicial opinions as racism ever was"... Cited from Sex Discrimination, Johnston and Knapp, 46 NYUL Rev. at 676 (1971).

Two cases generally cited to support the husband's right to bind the community in contracts to purchase realty, at least prior to 1973, offer no support to appellees position in the instant case. In Shreve v. Greer, 65 Ariz. 35, 173 P.2d 641, the seller, who had signed a memorandum agreeing to sell real property to plaintiff, later changed her mind and attempted to resc nd [sic] on the grounds there was "no equality of obligation because purchaser spouse had not signed". In enforcing specific performance, on a equitable remedy, the Court held the husband could enter into contracts for the purchase of real property without the wife's signature. In King v. Uhlman, 103 Ariz. 136,

437 P.2d 928, King and Uhlman had entered into a complex agreement whereby property was to be purchased, partially for the benefit of one Ellis and his wife. After Uhlman received the property, he resisted transferring it to Ellis on the grounds that his wife had never signed. In Uhlman the Court held that the property to be transferred by Uhlman to Ellis had never become part of the community since Uhlman took it with a constructive trust in Ellis for one half of the property.

Finally, it appears clear from judicial decisions of this state that had appellant wife, Dorothy Mead, approved or signed the receipt, a later recission would have been mandated. The deposit receipt and agreement, the subject matter of this action had on its face a monthly payment on a first mortgage of $344.00 plus a payment on the second mortgage. Appellees' witness, the escrow agent,

testified that the amount of $344.00 B-46
would not be acceptable, that the amount due was $346.00. The difference in the amount not revealed, was a material breach sufficient to rescind had, in fact, a contract been executed. Lane v. Bisceglia, 15 Ariz. App. 269 (1971).

The "floodgates of litigation" feared by Appellees counsel is, of course, neither relevant nor can it be supported on constitutional grounds. Decisions on constitutional issues by their nature, reach back into time to correct unconstitutional practices. This is not "retroactive" negation of vested rights as appellees counsel contends - for no one has a vested right in discriminating. Such invalid arguments, if accepted, would render segregated schools constitutional since segregation in "separate but equal" schools was accepted prior to Mr. Chief Justice Warren's landmark decision in United States and Brown v.

Board of Education, 75 S. Ct. 753, 349 U.S. 294 (1954). Women and blacks would still not be voting if we agreed that constitutional decisions could not look backward in time to eliminate the present effects of past discrimination. Griggs v. Duke Power Co., 91 S.Ct. 849, 401 U.S. 424 (1971). That the sex discrimination demonstrated so clearly in the instant case was accepted for decades does not relieve this Court of the constitutional requirement to strike it down, to eliminate the remaining vestigages of statutory distinctions between the sexes which in this state at least have the effect of invidiously relegating not only married women but the entire class of females to inferior legal status.

WHEREFORE, appellants pray that this honorable Court rehear this matter and reconsider its Order of February 4, 1975 and the Order Amending dated February 11,

[Signature of Dorothy E. Mead,
Attorney for Appellants]

[In the Superior Court of
the State of Arizona, in
and for the County of Pima:
Robert E. Nacey, et ux.,
Plaintiffs, versus Chester R.
Mead, et ux., Defendants;
Chester R. Mead, et ux.,
Third-Party Plaintiffs, versus
Florence M. Johnoff, et vir.,
et al., Third-Party Defendants]

Motion to Amend

Filed: April 13, 1973

The Defendants move to amend their pleadings:

The Complaint, Depositions related thereto and Exhibits on file all indicated the Defendant, CHESTER MEAD, purportedly acting as agent of the community of himself and his wife executed a deposit receipt and agreement and that she did not sign such instrument.

Under existing Arizona case law a

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husband may act as agent for the community of himself and his wife in the purchase of real property and the wife may find the community property bound by such act even though she has never signed.

Recently the Superior Court of Pima County has held that a husband as such has no authority to act on behalf of the wife in matters relating to her community property and that statutes relating thereto are unconstitutional for they deprive her of her property without due process of law or deprive her of equal protection as the ground of sex and discrimination.

Therefore, the pleadings must be amended to raise the question of constitutionality. These defendants desire to amend their Pleadings to add such defense as an affirmative defense being "any other matter constituting an avoidance or affirmative defense..."

Specifically, these defendants desire

to add the defense of unconstitu- C-3
tionality for the concepts of Arizona law which permit a husband to act on behalf of himself and his wife in the purchase of property are unconstitutional when community property is bound by the act of the husband. The unconstitutional provisions violated are Articles V and XIV of the United States Constitution and Article II sections 4 and 13 of the Arizona Constitution.

Memorandum of law - Rule 15 Amended Pleadings; Rule 8 Affirmative Defenses.

WHEREFORE, defendants request that they be permitted to file an affirmative defense of the following matter:

The concepts of Arizona law affect the constitutional rights of the defendant, Dorothy Mead, for they unlawfully bind a wife to the act of the husband on the sole ground that the husband is agent of an Arizona Community and under the

statutes and case law may act for the wife in the purchase of real property for the community without her knowledge or consent. C-4

[Signature of Lesher & Scruggs, Attorneys for Defendants Mead]

[Caption]

Docket Entry (Minute)

Dated: April 23, 1973

HEARING ON DEFENDANTS' MOTION TO AMEND:

Mr. Odgers argues to the Court.

The motion being untimely made,

IT IS ORDERED Defendants' motion to amend is denied.

Docket Entry (Minute)

Dated: October 2, 1973

The Court having taken this matter under advisement,

IT IS ORDERED that judgment be entered in favor of the plaintiffs against defendant Chester Mead only, for the sum of $11,160.00, plus costs incurred herein.

IT IS FURTHER ORDERED that the request for judgment against Chester Mead and Dorothy Mead, husband and wife, is denied as to Dorothy Mead individually.

IT IS FURTHER ORDERED that judgment be entered in favor of the third party defendants against the third party plaintiffs, and that third party plaintiffs take nothing by their complaint against the third party defendants and that third party defendants recover their costs from the third party plaintiffs.

Mr. Odgers shall prepare a written judgment. C-6

[Caption]

Motion for New Trial
Filed: October 24, 1973

The defendants, Chester Mead and Dorothy Mead, file their motion for new trial pursuant to Rules of Civil Procedure, Rule 59(a) on the following grounds:

1. That the Judgment is not justified by the evidence and is contrary to law.

2. Defendant, Dorothy E. Mead, further moves this Court to grant a new trial on the grounds that the Judgment entered herein denies her due process and equal protection under the Fourteenth Amendment to the Constitution of the United States

and further states that defendant speci- C-7
fically preserved the right to raise the
constitutional issues at the outset of
the trial of the above-captioned civil
action and that the Court erred in that
it failed to protect her constitutional
rights. Therefore, the Judgment is con-
trary to and in violation of the Four-
teenth Amendment to the Constitution of
the United States.

[Signature of Lesher & Scruggs,
Attorneys for Defendants Mead]

[Caption]

Docket Entry (Minute)

Dated: November 19, 1973

Messrs. Odgers and Stompoly have no objection to the motion to associate co-counsel.

It is Ordered that Dorothy Mead be

for the remaining matters in this case only.

Messrs Odgers and Stompoly argue to the Court on the objections to the proposed judgment.

Mrs. Mead argues to the Court on the Defendants' Motion for New Trial and orally moves for summary reversal on the constitutional questions.

The Court treats that motion in connection with the Motion for New Trial and

It is Ordered that both motions are denied.

It is Ordered that the Judgment be amended to provide for the sum in Country Escrow Service to be paid $1,000.00 to the third party defendants and $1,000.00 to the plaintiffs.

It is further ordered that the amount of $11,160.00 included in the judgment against the defendant Chester Mead, individually, be increased to $12,160.00 and

the Court will sign the Judgment as will be prepared by Mr. Odgers.

Mrs. Mead states to the Court that within ten (10) days she will file a Petition to remove the matter to federal court.

[Caption]

Judgment

Filed: November 19, 1973

The above-entitled matter coming on for hearing before the Court, the Honorable Robert O. Roylston, Judge, sitting without a jury, on the 1st and 2nd days of May, 1973, the Court at said time and place being presented with sworn testimony of witnesses and with written documents and other evidence, having taken the matter under advisement, counsel for the parties

having requested time for and having submitted written briefs on the law and facts, the Court being fully advised in the premises, and having determined from the law and facts which of the respective parties are entitled to judgment against others of the respective parties;

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs ROBERT E. NACEY and BARBARA M. NACEY, husband and wife, have and they are hereby awarded judgment against the defendant CHESTER MEAD, individually, for the sum of $12,160.00 plus costs incurred herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant DOROTHY MEAD have judgment against the plaintiffs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the third-party defendants have judgment against the defendants-third-party plaintiffs, CHESTER MEAD and

DOROTHY MEAD, husband and wife,
and that the third-party plaintiffs take nothing by their complaint and that the third-party defendants have their costs from the third-party plaintiffs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the sum of $2,000.00 held by Country Escrow Service, Tucson, Arizona, in escrow number CES 4X 3473-S during the pendency of this litigation be paid over (a) $1,000.00 to the plaintiffs ROBERT E. NACEY and BARBARA M. NACEY, over, above, and in addition to the judgment as set forth in favor of plaintiffs against the defendant CHESTER MEAD, individually, and (b) $1,000.00 to third-party defendant FLORENCE JOHNOFF.

[Signature of Robert O. Roylston,
Judge of the Superior Court)

United States Constitution, Fourteenth Amendment

Arizona Revised Statutes:

Section 25-211(B)
Section 25-214(A)

Arizona Rules of the Supreme Court:

Rule 5(f)
Rule 7(a)7
Rule 47

Arizona Rules of Civil Procedure:

Rule 59(a)

CERTIFICATE OF SERVICE

I, Dorothy E. Mead, attorney for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of July, 1975, I served copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona, on the several parties thereto, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to their respective attorneys of record as follows:

VINCENT E. ODGERS, ESQ.
Post Office Box 606
Tucson, Arizona 85702
[Counsel for Respondents Nacey]

JOHN G. STOMPOLY, ESQ.
250 North Church Avenue
Tucson, Arizona 85701
[Counsel for Respondent Johnoff]

JOHN G. STOMPOLY, ESQ.
250 North Church Avenue
Tucson, Arizona 85701
[Counsel for Respondent Van Auken]

Dated this 10th day of July, 1975.

Dorothy E. Mead

Dorothy E. Mead
Counsel for Petitioners
12201 North 65th Street
Scottsdale, Arizona 85254

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